

Caregiving Responsibilities

New Age, New Challenges for Employers

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At some point in their careers, most people have been admonished not to take their work home and to “leave it at the office.” In the ever-evolving world of employment law, the flow is reversing. Matters that once were personal and confined to one’s home, such as caregiving issues (caring for children or aging parents) are now invading the workplace and creating new challenges for employers.

Family responsibilities discrimination

There is a growing trend in the area of employment law: employees and applicants suing employers, alleging discrimination on the basis of their caregiving responsibilities at home for family members (such as children, aging parents or sick partners). These claims, generally brought as sex or gender discrimination claims, arise under a wide variety of circumstances, including an employee or applicant’s real or perceived family responsibilities, or stereotypes about motherhood or masculinity. This type of discrimination is generally known as Family Responsibilities Discrimination (FRD) and is an increasingly popular allegation by plaintiffs in employment discrimination lawsuits.

This growing trend is not surprising given that over 44 million Americans, or an estimated 21% of all households, provide care for an adult family member or friend. One in four employed men and women has eldercare responsibilities.

Given the surge of FRD claims, the Equal Employment Opportunity Commission (EEOC) recently adopted an enforcement guidance titled “Unlawful Disparate Treatment of Workers with Caregiving Responsibilities” to assist investigators, applicants, employees and employers in assessing whether certain conduct constitutes unlawful discrimination under Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990 (ADA). The guidance is available online at www.eeoc.gov/policy/docs/caregiving.html.

What is prohibited FRD?

The scope of FRD claims is broad, and it is important to keep in mind that the same legal standards that apply to other forms of discrimination, harassment and retaliation prohibited by the federal discrimination statutes also apply to unlawful discrimination, harassment and/or retaliation directed at caregivers or pregnant workers.

In analyzing claims regarding disparate treatment of female caregivers, the EEOC typically considers the following types of evidence:

- Whether the employer asked female applicants, but not male applicants, whether they were married or had young children, or about their childcare and other caregiving responsibilities
- Whether decision makers or other officials made stereotypical or derogatory comments about pregnant workers, working mothers or other female caregivers

- Whether the employer began subjecting women to less favorable treatment soon after it became aware they were pregnant
- Whether, despite the absence of a decline in work performance, the employer began subjecting women to less favorable treatment after they assumed caregiving responsibilities
- Whether the employer steered or assigned women with caregiving responsibilities to less prestigious or lower-paying positions
- Whether male workers with caregiving responsibilities received more favorable treatment than female workers



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Tips for avoiding FRD

In light of the growing attention toward FRD claims, companies should take proactive measures to prevent discrimination based on family responsibilities. Some suggested steps include:

- reviewing existing policies, practices, and hiring and assessment criteria to identify and remove any express differences in treatment based on sexually discriminatory stereotypes;
- reviewing existing policies to see if they are consistent with caregiver needs and do not require unnecessarily narrow ways of fulfilling job responsibilities;
- considering expressly adopting policies prohibiting discrimination based on family responsibilities, or adding family responsibilities to existing anti-discrimination or anti-harassment policies;
- educating and training managers, HR representatives and interviewers about FRD. Do not allow employees to make comments that express stereotypes about caregiving responsibilities;
- refraining from questioning applicants about family planning; and
- ensuring that personnel actions are based on actual facts, rather than stereotypes or assumptions. For instance, do not assume an otherwise potentially qualified female employee would not be interested in a promotion because it would involve relocating.

While the EEOC’s issuance of this enforcement guidance does not create a new protected category of individuals, it does raise the profile of FRD claims, and employers certainly can expect these claims to continue to increase. It is important that companies take steps to educate decision makers and interviewers about FRD and implement other measures to prevent such claims.

INFORMATION LINK

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